RIPARIAN RIGHTS; A PERVERSION OF STARE DECISIS.

Few things, indeed, are more misleading than labels. Yet we must use them. Some indication of contents, whether it be of a bottle or of a book, is well-nigh indispensable. If they do not convey to our minds any very accurate idea of the matter contained, they may, at least, be a safeguard against poison, or serve as a means of limiting the tax upon our eyesight.

"Riparian rights" is a broad term. It is a category dealing with an almost inexhaustible variety of situations and possibilities; and even an elementary treatise on the subject would require the greater portion of one year's issue of this magazine, and would, in all human probability, be most adequately calculated to reduce the number of subscribers to an inappreciable and unappreciating minority. Lest, however, the reader take alarm at this apparently sinister preface, I hasten to add that what will be discussed is a very small incident in that vast domain of law treating of those peculiar rights, neither wholly terrestrial, nor entirely aquatic, which might almost be denominated amphibious. Etymologically, the term "riparian rights," should refer specially to rights in rivers, but the alliance between law and etymology, never very close, has of late years, in our overworked law courts, and at the hands of our non-technical legislators, been severely strained. Consequently, I need scarcely apologize for saying that the class of riparian rights here treated has no reference to rivers, as such, but deals entirely with the foreshore or beach: viz., that portion of land which, lying between the low and high-water mark on a tide-washed shore, becomes alternately land and water. The term "littoral" is sometimes applied with greater accuracy to this situation, but the term "riparian" seems to be now consecrated by legal usage, and I do not sufficiently possess the temper of the reformer to attempt to change it.

Riparian questions have often played a great role in our jurisprudence. The rule of navigability has been extended to the great fresh water lakes, new conditions having made new law. The English common law test of navigability, once found inadequate, has been repudiated, although it had been sanctioned by a decision of the Supreme Court.[1]

[1] The Genesee Chief (1851) 12 How. 443.

The great rivers, forming highways for commerce between our States, have often been the subject of jealous controversy between the States whose territory they wash. The Supreme Court of the United States in the case of *Kansas* v. *Colorado*[2] has said that in dealing with these questions, it sat rather as an international tribunal than as a merely domestic one, dispensing international rather than common law, and unfettered by the ordinary technicalities of municipal law. Later, at a further stage of the same important litigation, in answer to the claim of the Attorney-General that the United States has an inherent power to regulate questions of irrigation, the court made the timely reply that the government of the United States was still one of enumerated powers only, possessing no inherent sovereignty; that the proposition advanced by the representative of the United States government that there are legislative powers which belong to the nation although not expressed in the constitutional grant of powers, was held to be in direct conflict with the constitutional principle that this is a government of enumerated powers; and the proofs that this is such a government clearly appear from the Constitution, even independently of the amendments, for otherwise, an instrument granting certain specified things would by construction be made operative to grant other and distinct things.

"With equal determination the framers intended that no such assumption should ever find justification in the organic act." [3]

Thus has the mere question of riparian rights called forth from our supreme tribunal emphatic repudiation of the doctrine that the federal government may have powers outside of and beyond the scope of the constitution.

Again, there are other phases of the law of riparian rights which have involved the broadest questions of constitutional law. How far such rights may constitute property, and how far such property may be taken without compensation, have formed the subject of notable State and federal adjudications.

The question directly treated in this article, although apparently a simple one, has been in dispute for many years. It may be stated thus: has the owner of land abutting upon the sea, or an arm of the sea, in which the tide ebbs and flows, the right to construct, for his own use, a dock giving him access to the navigable portion of the stream? It must, indeed, seem strange

[2] 1902) 185 U. S. 125, at 146.
[3] Kansas *v.* Colorado (1907) 206 U. S. 46, at 90.

to those not versed in the judicial literature of the subject that this question, until a few months ago, was still unsettled in our State. It has long been a bone of contention, not only in New York but in many other States, and many decisions, directly or indirectly involving the question, have appeared to be conflicting and confusing. The unsettled condition of the law upon the subject has led to bitter controversies in many sea-shore communities, yet it was only finally in March, 1907, that the Court of Appeals of this State definitely established as a rule of property the proposition that the

"riparian owner whose land is bounded by navigable waters has the right of access thereto from the front of his lot, and such right includes the construction of a pier on the land under water, beyond high-water mark, for his own use or for the use of the public, subject to such general rules and regulations as Congress or the State Legislature may prescribe for the protection of the rights of the public."[4]

The fact that the decision was reached by a divided court, three of the seven judges dissenting, can but add interest to the question and illustrate the uncertain state of legal opinion upon the subject.

The history of the controversy goes back to a remote time. It is apparently one of the most ancient in English law. A short sketch of it may not be uninteresting as indicating how slavishly in some respects our law has followed ancient precedents originating at a time when social and political conditions were far different from our own; and with what difficulty we are able to make new departures more consistent with the needs of modern society.

In England, rights in the foreshore have been a subject of legal contention almost since the Norman Conquest. Prior to that momentous event, a riparian owner under the Saxon law apparently held his land undisturbed and unfettered down to the low-water mark. The claim of the Crown to the *jus privatum,* or private ownership in the foreshore, as opposed to the *jus publicum,* or right of the King as a mere trustee for the public, which was always recognized, does not appear to have been developed prior to the sixteenth century. Crown prerogative and royal property formed one of the elements of the policy of Tudor and Stuart kings. Unoccupied land, fishing rights, wrecking rights and the soil of the foreshore fell within the range

[4] Town of Brookhaven *v.* Smith (1907) 188 N. Y. 74. (Headnote 1.)

of their covetousness, and able Crown lawyers were soon found, ambitious and ingenious enough to devise theories and fictions by which the King could lay claim to the land between the low and high-water mark; but it remained for the judges of Charles I finally and definitely to declare as law the theory that the King alone owned the foreshore.

The study of the history of legal institutions has been said to tend to make one a legal skeptic. The history of the English law is admirably illustrative of the development of legal theories, and their erection into principles or rules which come to be clothed with an almost sacred character, yet whose origin upon examination is sometimes found to be neither in historic truth nor in social justice.

Principles of property, or family law, whose supposed antiquity leads to their being treated as elementary, often prove to be of comparatively recent origin and to reflect radical changes in the social and economic balance or structure of society. The doctrine of the English law for more than two centuries has been that the King was presumed to own the foreshore, and this presumption could not be rebutted save by the exhibition of an actual Crown grant to the claimant or his predecessor in interest. This doctrine, termed the *"prima facie"* doctrine, is stated in Blackstone and in the usual standard text-writers in England and America as a settled proposition historically and legally sound. That it was historically false and had its origin in the usurpation and greed of the Stuart kings and in the subservient ingenuity of the Crown lawyers, has been left to modern scholarship to demonstrate. The discovery and publication of old grants and court records have thrown new light upon the subject, and instructive reference to them may be found in the scholarly and erudite work of Mr. Moore on the history of the law of the foreshore and seashore.[5]

Moore appears to have successfully demonstrated that prior to the Norman Conquest the Saxon lands were in fact, if not in name, manors, and that the riparian owners owned either to the thread of the stream or to the low-water mark, as the case might be. After the Conquest, the large Saxon landholders were not disturbed, and their grants were in large part either confirmed or their substance incorporated into such new grants as were made. There is no evidence that the Norman or Angevin kings

[5] Moore, History and Law of the Foreshore and Seashore.

made any claim to the foreshore except when they themselves were lords of a particular manor. Mr. Moore says:[6]

"Instead of it being true that the Crown retained the foreshore when granting out its dominions, it is more probably true that the Crown did actually grant it out by its original grants of almost every manor in the kingdom, and consequently that the theory of the *prima facie* title is one on which little reliance can be placed."

Evidently that quaint and charming old writer, Bracton, did not recognize this *prima facie* theory as part of the English law in his day, for in his Institutes he leaves out that portion of Justinian's work which claims for the Imperial power the right to the foreshore.

The theory of the kingly ownership of the foreshore was invented by an ingenious Crown lawyer, one Thomas Digges, in the reign of Elizabeth. His claim was that the foreshore belonged to the Crown, not as other royal property, but as part of the royal prerogative, and he supported it in a learned thesis on the subject, based upon an assumption of a state of facts of which there is no proof, and the reverse of which almost certainly existed. Before the reign of Queen Elizabeth the true presumption of fact with regard to the ownership of the foreshore should have been the exact reverse, namely, that it was in the riparian owner rather than in the Crown. It appears that during the reign of Elizabeth and James I, in a number of cases, the Crown claim to foreshore ownership was made by astute lawyers, filled with zeal to enlarge the royal jurisdiction; but all these cases seem to have been unsuccessful until the famous case of *Attorney-General* v. *Philpot*,[7] in 1628, which, we may say in passing, is mentioned in the dissenting opinion in the *Brookhaven*[4] case as the leading English case establishing that doctrine. That case does not appear to be reported, but Mr. Moore has found the manuscript record, and gives it *in extenso* in his work. It is extraordinary that it should be the foundation of a rule of property law, which until 1907 was the law in the State of New York, when we reflect that the case was decided by judges, some of whom sat in the famous Ship Money case, and upon whom history has placed a heavy load of obloquy. The decision was apparently procured, as the Ship Money judgment had been, by the personal pressure of

[6] Moore, *supra*, 3d Ed., page 29.

[7] Attorney-General *v.* Philpot (1628), reported only in Moore, *supra*, page 262, *et seq.*

Charles I for the purpose of obtaining for the Crown properties and revenues to which it had no just title. The claim, says Mr. Moore,

"was founded in untruth and injustice, and the too great insistence upon it by King Charles I unquestionably was one of the causes of the great Revolution." [8]

Sir Thomas Townsend, writing to a friend as to the *Philpot*[7] case, intimates that it will be properly disposed of "when some of the barons have received directions from the King." The case itself seems to have been a moot case, contrived by the Stuart monarch for the purpose of obtaining a decision which might bring him needed revenues. The Crown lawyers raised the question by making a lease of a piece of foreshore to one Cornelius Vanderbilt, with a view to establishing legal title by an action. It appears an odd coincidence that the Court of Appeals two centuries later in the case of another Vanderbilt,[9] should have declared as New York law, the proposition advanced by Vanderbilt on behalf of Charles I in the *Philpot*[7] case.

That a decision rendered under such circumstances should have stood as law in the United States for more than a century, is a strong commentary upon the conservatism of our judges, and perhaps, incidentally, upon their lack of knowledge of or indifference to history, at least as found outside of the reports of the law courts. The "Grand Remonstrance" of 1641 is almost as noteworthy a landmark in the history of English liberty and constitutional law as the Great Charter itself, yet how many judges who have learnedly considered these questions have had in mind the Twenty-sixth Article of that memorable document, charging the King with "taking away of men's rights under color of the King's title to land between high and low-water mark?"

After the downfall of the Stuart tyranny the claim seems to have been abandoned, or at least not pressed for many years, and the judgment in the *Philpot*[7] case itself was apparently never executed, owing doubtless to the advent of the Revolution. There were, as there had been before, many cases relating to interference with the *jus publicum,* but we must wait many years before we find another precedent for the Stuart doctrine of *jus privatum.* It has always been admitted that the *jus publicum* was inalienable, and in examining the early cases care must be taken to distinguish between the two.

[8] Moore, *supra,* Introduction, XXXV.
[9] People *v.* Vanderbilt (1863) 26 N. Y. 287.

The theory of the Crown lawyers was, that the King in his capacity as representative of the whole realm was charged with the duty of safeguarding the right of the public to navigate tidal waters or to use the foreshore for fishing purposes, etc., but that in addition to this merely public function he possessed in his own right, as the general residuary owner of all the soil in England, the *jus privatum*, or title to the soil of the foreshore, which conferred upon him the right either to alienate or to use this property in any way not incompatible with the *jus publicum*. The difference between the two is clearly and adequately instanced in the next case which we find adopting the doctrine of the *Philpot*[7] case. This case is the *Attorney-General* v. *Richards*,[10] decided in 1795. The Crown had proceeded by information to obtain a decree abating a dock or quay erected upon the foreshore of Portsmouth Harbor by the riparian owner. The action seems to have proceeded upon the double ground (1st) that the structure was a nuisance, and therefore obnoxious to the *jus publicum*, and (2d) that it was a purpresture, that is to say an erection or enclosure on the King's soil, and hence summarily abatable as such. The defendant, in answer to the first point, claimed that he should have had a trial by jury, and, as to the second, endeavored to show evidence of a grant of the foreshore and ancient usage. The Court apparently thought the answer to the first question adequate, but granted a decree in favor of the Crown on the ground that "the soil is the property of the Crown." The Court, nevertheless, indicates some little squeamishness as to following the *Philpot*[7] case, for it says:[11]

"It is objected that this case was in the time of Charles I; but it must be remembered that Lord Hale determined some of them, and approved the rest."

It does not appear to have been noted by our Courts that the *Richards*[10] case was later than our adoption of the common law, and that at the time when the common law became a part of the law of the State of New York, the famous (or infamous) *Philpot*[7] case was the only authority for the doctrine that the erection of a pier on the foreshore by a riparian owner was *per se* abatable as a purpresture.

Johnson v. *Barret*[12] is also generally cited as upholding the

[10] 2 Anstruther 603.
[11] At page 616.
[12] (1647) 3. Aleyn K. B. Reports 10.

prerogative doctrine, but the report is incomplete and the subsequent history of the dispute proves that the obstruction made navigation dangerous "to ships in the ebb tyde."

The English law itself has been somewhat modified of late years, and now a riparian owner may not be cut off from his access to the water.[13]

The case of *Parmeter* v. *Gibbs*[14] followed the *Attorney-General* v. *Richards*[10] case, and simply maintained the *prima facie* doctrine as law in England. Sir Matthew Hale, who wrote his famous treatise on the subject in 1786, and who has been cited as the most respectable authority for the proposition, does not seem to have himself believed that the Crown historically was the owner of the foreshore, but merely that there was a presumption of law to that effect in the absence of contrary proof.

It is impossible here to trace the doctrine of the *jus privatum* in its various ramifications throughout the United States. We will confine ourselves to a brief synopsis of its history and development in this State and its final burial by the Court of Appeals in the *Brookhaven*[4] case after two hundred years of noxious vitality.

Before adverting to the New York cases, however, there are three important decisions of the Supreme Court of the United States involving the doctrine. They are in the order of time as follows: *Yates* v. *Milwaukee*;[15] *Shively* v. *Bowlby*;[16] *Scranton* v. *Wheeler*.[17]

It is needless to consider in this article how far these cases are reconcilable. Suffice it to say that the advocates of the doctrine that a riparian owner has no wharfage privilege claim that the expression to the contrary in *Yates* v. *Milwaukee*[15] is a mere dictum. That oft-quoted expression was written by Mr. Justice Miller and is as follows:[18]

"*Whether the title of the owner of such a lot extends beyond the dry land or not*,[19] he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such

[13] Buccleuch *v.* Metropolitan Board of Works (1872) L. R. 5 H. L. 418; Lyon *v.* Fishmongers Co. (1876) L. R. 1 App. Cas. 662.
[14] (1813) 10 Price 412.
[15] (1870) 10 Wall. 497.
[16] (1894) 152 U. S. 1.
[17] (1900) 179 U. S. 141.
[18] Page 504.
[19] The italics are the writer's.

general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be * * *. This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

The disclaimer by the Court of the relevancy of the question whether the riparian owner had title to the foreshore is most significant, since, had the Court held the English view of *jus privatum,* the dock, if the foreshore was not in the riparian owner, would have been an erection upon the soil of the King (or his successor, the grantee) and hence summarily abatable as a purpresture.

It has been claimed in the *Brookhaven*[4] case that this expression of the Court in the *Yates*[15] case has been the origin of nearly all the *dicta* in the New York reports to the same effect. However that may be, the doctrine has itself now finally been adopted in New York.

In *Shively* v. *Bowlby,*[16] a characteristically exhaustive and learned opinion was written by Mr. Justice Gray. He comes to the conclusion, after citing copiously from Lord Hale and some of the English decisions, that

"by the law of England, also, every building or wharf erected, without license, below high-water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation."[20]

We thus have here a most unqualified statement of the Stuart doctrine of *jus privatum.* The learned Justice further reviews the law in the different States and finds considerable diversity upon the question as to the rights of the riparian owner in the land below high-water mark. The real question, however, involved in the case was, whether grants made by the territorial government while Oregon was a territory passed title to the foreshore, so that the government of the State was precluded from claiming it after the territory was admitted. In final analysis, this case merely declares the law of Oregon to be that of the *prima facie* doctrine as to the ownership in fee of the beach.

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[20] At page 13.

In the later case of *Scranton* v. *Wheeler*,[17] the question involved was whether the United States government, for the purpose of improving navigation, might erect a pier which would interfere with the access of the riparian owner to the navigable portion of the stream. The authorities were reviewed fully, and it was held that, although a riparian owner has a right of access, his access must be held in subordination to the right of the government to improve navigation. The Court so phrase their view of the law:[21]

"If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, *a taking of private* property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates*[15] case, in due subjection to the rights of the public—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation."

This statement of the law is a declaration that the riparian owner holds his right subject to the *jus publicum*, and no question of the ownership by the Crown or by the State of the foreshore was necessarily involved; Justices Shiras, Gray and Peckham, however, dissented, holding that if by the law of the State in which the land is situated, the right of access is one of the incidents of abutting land, such right is property, and cannot be taken away without compensation. The difference, therefore, between the members of the Court appears to be, not as to the existence of the upland owner's property right of access, but whether the right of the government to have the navigation improved is altogether paramount, or whether it could only be exercised after condemnation of such right. Thus aside from the views expressed by the Court in *Shively* v. *Bowlby*[16] as to the English common law, and its having become a part of the law of Oregon by adoption, there is nothing in any of these decisions holding that the

[21] At page 164.

ancient royal *jus privatum* and doctrine of purpresture became part of the common law in the United States.

We are now brought to consider the New York law and the antecedents of the *Brookhaven*[4] case. They are referred to in great detail in that case and it would be wearisome iteration to treat them here at length. Suffice it to say that in the year 1892, the case of *Gould* v. *Hudson River Railroad Co.*,[22] holding a riparian owner without remedy against a railroad corporation which cut off his access to the water, was reversed, and the right of access upon the part of an upland owner held to be a property right as against a private corporation whose erection of a railroad took it away or interfered with its enjoyment. *(Rumsey* v. *Railroad Co.)*[23] Throughout this and later cases the statement appears in almost similar language to that used in the *Yates*[15] case, to the effect that the right of access of the riparian owner includes the right to make a landing, wharf, or pier for his own use. That precise question, however, was not necessarily involved in any of the cases. It appears clearly, nevertheless, that the right of access was a property right, although it was held in the case of *Sage* v. *The Mayor*,[24] that such right must be held in subordination to the right of the municipality to improve the navigation of the river. This is in line with the decision of the Supreme Court of the United States in *Scranton* v. *Wheeler*.[17]

It was decided, upon the other hand, in the *Matter of the City of New York*,[25] that the erection of the Speedway along the Harlem River, by which abutting owners were cut off from access to the river, constituted a taking of property for which the city was liable, thus emphasizing the fact that the riparian owner had a property right, subject only to the *jus publicum;* otherwise, as the City owned the foreshore it could have used it as it wished. The *jus privatum* was thus not recognized as law. This result seemed fairly deducible from the other decisions, as no amount of legal ingenuity could torture the erection of that delightful pleasure-ground into an improvement of navigation.

None of these recent cases, however, really considered the distinction between the *jus privatum* and the *jus publicum.* In the *People* v. *Vanderbilt*,[9] the Court of Appeals, possibly unnecessarily, but nevertheless somewhat positively, committed itself to the pur-

[22] (1852) 6 N. Y. 522.
[23] (1892) 133 N. Y. 79.
[24] (1897) 154 N. Y. 61.
[25] (1901) 168 N. Y. 134.

presture doctrine. The defendant had constructed a solid pier filled with stone beyond the New York harbor line and an action was brought in behalf of the people to restrain the erection of such pier and to compel the removal of the part already built. It would seem from the report that the decision might well have been placed upon the ground that the pier was an obstruction to navigation and, as such, a nuisance. This is the view taken of the decision by the Court in the *Brookhaven*[4] case. The Court, however, in the *Vanderbilt*[9] case did not ostensibly rest its decision upon such ground. They say:[26]

"The crib sank by the defendant and the proposed pier were a purpresture, and were, *per se*, a public nuisance. *The offer, therefore, of the defendant's counsel to prove by the testimony of witnesses that the crib and proposed pier were not, and would not be, an actual nuisance, and would not injuriously interfere with or affect the navigation of the river or bay, was properly overruled.*"[19]

As an authority on this proposition is cited *Attorney-General* v. *Richards*,[10] discussed above. I am not aware of any other cases in the higher courts in this State standing squarely for the royal prerogative doctrine.

The law stood in this situation when the case of the *Trustees of Brookhaven* v. *Smith*[27] reached the Appellate Division in the Second Department. It appears that the town of Brookhaven was seized of certain lands under water under ancient royal grants dating back to 1666. Claiming a right to a fee ownership in the foreshore under these grants, the town leased such foreshore to persons other than the riparian owners. The riparian owners had built docks upon this leased land, and the town lessees consequently sued them in an action for trespass. No questions of navigation, or of the rights of the general public, were involved. It was necessary to determine whether the town was the owner of the foreshore under such old grants, and if so, whether it consequently had a right to abate as a purpresture the dock in question. The Appellate Division assumed that the grant of the lands under water conveyed the title of the town to high-water mark, and that the grants were to be interpreted in the light of the law at the time they were made. Under such law, so the Court held, the king was the owner of the foreshore and any

[26] 26 N. Y., at page 297.
[27] (1904) 98 App. Div. 212.

riparian owner who placed anything thereon was a mere trespasser.

"By the law of England," says the Court,[28] "as it existed at that time, every building or wharf erected without license below high-water mark, where the soil belonged to the King, constituted a purpresture and might, at the suit of the King, be either demolished, or be seized and rented for his benefit, if it did not constitute a nuisance to navigation, * * * and no reason suggests itself why the defendants should have a higher right against the grantees of the King than they would have had against the sovereign of Great Britain had he continued the owner of the soil."

Consequent upon this decision, efforts to enforce supposed town rights by summarily destroying the wharves of the abutting owners were made on Long Island. The writer of this article was, among others, a victim of the ancient Stuart doctrine of purpresture and the vicious but ancient legal theory of the *jus privatum* devised by Mr. Thomas Digges, sanctioned by the Ship Money judges, and whose final manifestation took the form of ludicrous antics on the part of petty town officers intoxicated by the recrudescent exuberance of royal prerogative. This zealous desire to conform to the latest utterances of the courts, and to vindicate the kingly dignities inherited from English monarchs vested by ancient grant in municipal corporations, added greatly to the interest in the result of the appeal to the Court of Appeals in the *Brookhaven* case.

Prior to that decision, however, the Appellate Division in the Second Department decided the case of *Coudert* v. *Underhill.*[29] In that case the ruling in the *Brookhaven* case was affirmed, and the statement in a recent case in the Court of Appeals[30] to the effect that the right of access included the right to make a landing, wharf or pier, was distinguished on the ground that, *while this might be true where the foreshore was owned by the State, such was not the law in the case of a municipal corporation.* The right to erect a dock

"has no reference to a situation where the fee of the soil between high and low-water mark *is in an individual or corporation.*"[31]

As the fee of the soil, whether in the State or in the municipal corporation, must ultimately have been derived (if derived at all)

[28] At page 217.
[29] (1905) 107 App. Div. 335.
[30] Thousand Islands Steamboat Co. *v.* Visger (1904) 179 N. Y. 206.
[31] At page 336; the italics are the writer's.

from the English Crown, it is difficult to see upon what ground a distinction could be made, between the State as owner and a municipal corporation as its grantee. However, this point although discussed upon the argument, was not adverted to in the *Brookhaven* case and we may assume that the Court of Appeals found that even its novelty did not require any mention. It is interesting to note as a commentary on the possible ramifications of the ancient legal proposition, the suggestion by an appellate court that the ancient kingly *jus privatum,* while it might not pass to an American State, could pass in all its panoplied majesty to a mere municipal corporation. Such a doctrine was, of course, inconsistent with the decision of the Court of Appeals in *Coxe v. State,*[32] holding that the State inherited the foreshore in a purely governmental capacity and could not grant it out for speculative purposes—"a sovereign, not a proprietary right."

In the Court of Appeals the argument made on behalf of the town was that

(1) The ancient grant to the town of Brookhaven must be construed in the light of the law as it then stood. This law was to be found in *Attorney-General* v. *Philpot*[1] and some of the other cases heretofore referred to.

(2) The rights of the town as so interpreted were vested rights and could not be disturbed without compensation.

The claim of the town, if its analysis of the situation was well-founded, led to a grave constitutional question. The Supreme Court of the United States has very recently held that a State court cannot by a change in its common law deprive persons of the enjoyment of something that had theretofore been considered property or a necessary incident thereto.[33] Had the Court of Appeals actually declared not to be a property right something which when the royal grants were made had been property, this change in the law might well have been claimed to impair the obligation of contract and to constitute a taking without due process.

It might, I believe, have been a sufficient answer to the town's position to say that their view of the English law was not sound. Prior to the adoption of the English common law by the State[34] there was, as has been indicated, no valid or adequate precedent to the effect that a structure erected on the foreshore by a riparian

[32] (1895) 144 N. Y. 396.
[33] Muhlker *v.* Harlem Railroad Co. (1905) 197 U. S. 544.
[34] 1777.

owner in order to give him access to the navigable portion of the water, was, in and of itself, a trespass or encroachment on the King's soil. The whole doctrine of purpresture might well have been regarded as merely an ingenious theory of overzealous and unscrupulous Crown lawyers, which, at least in 1777, had not become a settled part of the common law.

The Court of Appeals, while not treating the question in exactly this fashion, reached a similar result, and quite as effectively relegated the *jus privatum* to the very proper category of legal antiquities.

In a most erudite and interesting opinion, Judge Gray held that assuming the English law to be as claimed, yet—

"The adoption by the people of this state of such parts of the common law, as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles which are inapplicable to our circumstances and which are inconsistent with our notions of what a just consideration of those circumstances demands. * * * 'no doctrine is better settled than that such portions of the law of England, as are not adapted to our conditions, form no part of the law of this state.' "[35]

"The *jus privatum* of the crown, by which the English king was deemed to own the soil of the sea and of navigable rivers, in his own right, rather than as a sovereign holding it in trust for his people, however applicable to the conditions in Great Britain, were totally inapplicable to the situation of the colonists of this country. In Gould on Waters, the author remarks, as to this, that 'there is no evidence that the *jus privatum* * * * was ever asserted in the colony as the right of the Crown, or that it has, until recently, been claimed by the States; but there is, on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the land from the first settlement of the province and exercised by them to the present day, so as to have become a common right and thus the common law."[36]

Here at last the *coup de grâce* has been given to the old doctrine. The elaborate structure invented by the keen but time-serving Digges, adopted by the Stuart kings, sanctioned by subservient judges and finally through the invincible English love of precedent become part of the common law, has at length died in the year 1907 as the consequence of a lawsuit over a little dock on a Long Island shore.

[35] Town of Brookhaven *v.* Smith (1907) 188 N. Y. 74, at 79.
[36] At page 80.

The opinion further refers to the fact that riparian owners have everywhere made their right of access available by building piers or wharves "and have done so without interference by the State where superior public rights have not been obstructed."

"These interests must be very large and if we shall hold with the English common-law doctrine that they are purprestures or unlawful encroachments upon the proprietary rights of the State * * * it would result in causing a very grave loss."[36]

The New York cases are fully reviewed and it is shown that succeeding cases had completely and admittedly overruled the case of *Gould* v. *Hudson River R. R. Co.*,[22] and the right of access of the riparian owner and the fact that this right constituted property had been frequently and emphatically recognized and repeatedly said to include the right to build a wharf.

In answer to the suggestion that these expressions in the cases referred to, notably the *Rumsey*[23] case and *Thousand Islands Steamboat Co.* v. *Visger*,[30] were mere *dicta*, the Court said:[37]

"While it may be true that what was said, as to the measure, or substance, of the riparian owner's right of access from his upland to the navigable body of water in front of it, was not essential to the decision of the precise issue, it was, nevertheless, the deliberate and careful expression of an opinion as to that right and one not altogether impertinent to the decision of the particular case. As establishing the rule of law in this state upon the extent of a riparian owner's right, the decision in the *Rumsey* case has been followed, and acted upon, by the Appellate Division of the Supreme Court, in at least three of the judicial departments."

The opinion summarizes the whole situation in the following concise expressions:[38]

"So I conclude that the question is not what was the common-law doctrine concerning a riparian owner's right in the foreshore, or tideway; but what that right has been construed to mean by the courts of this state. The town of Brookhaven acquired its title under the royal grants; but it holds it in trust for the members of the community and, if we admit that the plaintiff, Post, as its lessee, took exclusive rights under its lease, they cannot avail to abrogate, or to destroy, a right, which appertained to a riparian ownership, to make available the easement, or right of access, by the construction of a landing, pier or wharf.

"For these reasons, I advise that the judgment below be reversed and, as the controversy does not depend upon the facts, that the complaint be dismissed; with costs to the appellants in all the courts."

[37] At page 83.
[38] At page 87.

The old doctrine, however, died a hard death, for we find an elaborately erudite dissenting opinion written by Judge Hiscock and concurred in by Judges Vann and Werner. Judge Hiscock takes the view that at the time the grants were made, the King had, by English law, title to the foreshore and the grants were in the nature of contracts to be construed and interpreted in the light of the law, as it prevailed when they were made. Two classes of rights existed in the King, the *jus publicum* and the *jus privatum.* The latter

"was a property right and the title and right which he (the king) enjoyed in this capacity he could by virtue of his proprietary interest convey to a private individual, but always subject to the rights and privileges of the people at large comprehended within the definition *jus publicum*" [39] * * *.

"An unauthorized obstruction, injuring the *jus publicum* by impeding or in any manner interfering with the common right of the public to navigate and use the waters was and is a nuisance and to be abated as such. A purpresture relates, on the contrary, to the *jus privatum.* It was and is an invasion of the right of property in the soil while held by the king or the people. It might or might not also be a nuisance." [40]

"Thus we find that all of the expressions in these cases tending to support appellants' proposition are rather by way of illustration and amplification of what was essentially involved than otherwise, and moreover that directly or indirectly they are based upon the *Yates* case which, upon this point, can no longer be regarded as authoritative."[41]

The doctrine of the *Brookhaven*[4] case has been very recently reaffirmed and distinguished in the case of *Barnes* v. *Midland Railroad Terminal Co.,*[42] decided November 10, 1908. The owner of lands upon the Staten Island shore had constructed a pier connecting his uplands with the sea, but in addition, he had placed under the pier a fence or barrier apparently designed for the purpose of obstructing the passage along the shore. The question argued in the case was whether the riparian owner's rights in the foreshore were so exclusive as to enable him to errect a barrier which prevented the public walking along the beach. The Court took the view that while under the *Brookhaven* case, the owner had a right to erect a pier which might incidentally be an obstruc-

[39] At page 90.
[40] At page 91.
[41] At page 102.
[42] 85 N. E. 1093; 40 N. Y. L. J. 927.

tion to pedestrians on the foreshore, nevertheless, this right was limited to the necessities of the situation, and that in the case at bar, the barrier under the pier was unnecessary for the riparian owner's purposes of access and was an interference with the rights of the public to pass along the foreshore. This decision does not seem to in any way conflict with or encroach upon the doctrine of the Court in the *Brookhaven* case. There are, however, some remarks which may be taken to indicate that the death struggles of the ancient *jus privatum* are not quite over. The Court says: [43]

"The same reasons which underlie the decision in the *Brookhaven* case as to the rights of littoral and riparian owners apply with even greater force to the right of the public to use the foreshore upon the margin of our tide waters for fishing, bathing and boating, to all of which the right of passage may be said to be a necessary incident. Except in so far as the *jus privatum* of the Crown has devolved upon littoral and riparian owners, that right now resides in the people in their sovereign capacity. This is the logical result of our decision in the *Brookhaven* case, and it is in harmony with the development of our history and the spirit of our institutions."

I incline to believe that it is not some fragment of the discredited and dismembered *jus privatum* that now resides in the right to walk along the shore and to pass over the beach between high- and low-water mark. It would seem to be properly included in the *jus publicum* and appears analogous to the right of the public to pass in a boat over the foreshore when the tide permits it. In order to sustain this right, it is not necessary to invoke the shade of the dead prerogative doctrine, for as the opinion itself, in referring to the *Brookhaven*[4] case, says: [44]

"the *jus privatum* of the crown, by which the sovereign of England was deemed to be the absolute owner of the soil of the sea and of the navigable rivers, was totally inapplicable to the conditions of our colonies when the common law was adopted by them; and that this right, from the first settlement of our province, seems to have been abandoned to the proprietors of the upland so as to have become a common right, and thus the common law of the State."

As the referee found that the riparian owner had a grant of land from the State, which grant contained a condition that neither he nor his successors should erect any obstruction of any kind

[43] *Per* Werner, J., 85 N. E., at 1096.
[44] 85 N. E., at 1096.

in or upon the land lying between the lines of high- and low-water mark as they now exist, etc., the case might easily have been made to turn upon the terms of the grant. The Court, however, seemed to be clearly of the opinion that the terms of the grant did not affect the riparian rights, but that the right to build a wharf does not include the right to obstruct the public passage unless such exclusion be necessitated by the nature of the wharf itself. It remains to be seen whether a riparian owner would be allowed to build a solid pier which would necessarily prevent all movement along the shore. We can only say that in view of the *Brookhaven*[4] case and the *Midland Railroad*[42] case, this problem would probably be determined by reserving as a question of fact, the proposition as to whether that particular kind of a pier was suitable and necessary to the premises in question. The Court indicates this pretty clearly in the following apposite language: [44]

"It is enough to say that either as littoral owner or by virtue of its letters patent, the defendant had the right to construct and maintain a pier that was reasonably adapted to the purpose for which it was primarily intended, and that was to provide a means of passage from the upland to the sea. To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the foreshore, the former was paramount and the latter was subordinate; and the logical corollary to that proposition is that, just in so far as the attempted exercise of the littoral or riparian right passed the prescribed bounds of necessity and reason, the conditions were reversed and the right of passage along the foreshore remained the paramount right."

The Court did not advert to *Blundell* v. *Catteral*,[45] in which it was held that the public had no right to bathe or walk along the beach.

This (*Barnes*) case is also interesting from another standpoint; the question as to whether a riparian owner by reason of a grant of the foreshore from the State would have superior rights to one who did not have such a grant, has been a mooted subject for years. The opinion seems to assume that the riparian owner's right would be the same in either event, as the State could not surrender any of its public rights by a transfer of the title to the soil. This seems a perfectly logical deduction from the *Brookhaven*[4] case, which by abolishing the *jus privatum* really prevents the State from transferring anything, since the naked title to the soil can give no part of the *jus publicum*, which is all that

[45] (1821) 5 B. & Ald. 268.

the State has, and which it possesses regardless of the question of the fee ownership in the foreshore. While this point may not be definitely determined by either of the cases in question, it would seem to be a corollary from the doctrine of both. Fee in the foreshore may thus become a purely academic question, affecting neither the rights of the public nor the rights of the riparian owner.

It is frequently the proud boast of devotees of the English law, that "the common law *broadens* down from precedent to precedent;" on the other hand, the civilian is apt to tell us that the common law by its slavish adherence to the rule of *stare decisis* has rather a tendency to *narrow* down from precedent to precedent. Both beliefs probably express certain phases of the truth. The history of civil liberty aptly illustrates the correctness of the first view, at least in regard to one great department of human activity, while the law of real estate, still so full of archaic matter despite the efforts of legislation to rationalize, clarify and simplify its ancient and largely rudimentary structure, may well justify the other. Perhaps the tendency to a broadening development in matters affecting human liberty is explicable upon the theory that as law must ultimately reflect the dominant opinion of the time, the growth of English civil liberty was due rather to the pressure of enlightened public opinion from outside the bar, than to the efforts of the lawyer class itself; while, on the contrary, the law of real estate was developed wholly by lawyers for lawyers, and nearly always in hostility to any attempts at legislative change, until it became a game for experts whose intricacies passed the common understanding, almost as much as did the Hegelian philosophy.

The mere doctrine of precedent may, if used by the courts in mechanical fashion, make law as unchangeable as that of the Medes and Persians. A precedent isolated from the atmosphere of contemporaneous history is necessarily unintelligible; it must be considered in the light of the circumstances and the social conditions under which it arose. The famous *Dred Scott*[46] case considered entirely apart from the history of the times and the causes that led up to it, would make a feeble and inadequate basis upon which to build. Why should generations of judges have considered the *Philpot*[7] case of more value in guiding the judicial footsteps than the "Great Remonstrance," which denounced the doctrine of that case as usurpation?

[46] Dred Scott *v.* Sanford (1856) 19 How. 393.

If class opinion tends to narrowness, is it not largely because the following of precedent is regarded as a virtue in and of itself, rather than as a means of reaching wise and just results by applying the collective and traditional wisdom of generations of judges to the solution of legal problems? Yet when this useful principle is applied mechanically and unhistorically, it may easily result in fastening upon our jurisprudence, doctrines which originated neither in collective nor in individual wisdom but were merely the result of class greed, judicial subserviency or passing public clamor, none of which causes can be trusted to create sound precedents. The point discussed in the article is a mere incident in the broad domain of riparian rights, but it involves an interesting bit of legal history, for we can see the origin and watch the development of a legal doctrine until the day when we assist at its final obsequies. As a study in legal morphology its discussion may seem "worth while."

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